IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 461

PRENTISS M. BROWN, AS ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION,
Appellant,

vs.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.,
Respondents.

PETITION TO FILE BRIEF AMICI CURIAE

and

BRIEF AMICI CURIAE

M. R. KEITH,
305 South Fifth Street,
R. H. FRYBERGER,
1110 Baker Building,
Minneapolis, Minnesota,
Amici Curiae.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX

CASES CITED

TEXTS CITED

STATUTES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 464

PRENTISS M. BROWN, AS ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION, *Appellant,*

vs.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR., *Respondents.*

PETITION TO FILE BRIEF AMICI CURIAE

The undersigned ask for permission to file the following brief *amici curiae:*

The issues, among others, involved in the present case are whether the rent provisions of the Emergency Price Control Act of 1942 are invalid on the grounds of improper delegation of legislative power, and are violations of due process.

The undersigned appear as the attorneys of record, representing the defendants in the following cases, now pending in the courts hereinafter mentioned, wherein the identical questions involved in this case are presented for determination, to-wit:

> *Chester Bowles, as Administrator of the Office of Price Administration, vs. Warner Holding Company, a Corporation*, now pending in the United States District Court, District of Minnesota, Fourth Division, bearing File No. Civil 884, which is an action brought for an injunction restraining defendant from violation of the provisions of said Act;

the following cases pending in the Municipal Court of the City of Minneapolis, Minnesota, which are actions brought by tenants for the purpose of recovery of treble damages,

attorney's fees and costs, under Sec. 205 (e) of said Act, to-wit:

Ira A. Desper vs. Warner Holding Company, a Corporation, No. 392556;

Charles M. Lamar vs. Warner Holding Company, a Corporation, No. 392555;

M. E. Grochau vs. Warner Holding Company, a Corporation, No. 392554;

Walter C. Koepke vs. Warner Holding Company, a Corporation, No. 393834;

Thomas E. Regnier vs. Warner Holding Company, a Corporation, No. 393835;

Irving Russoff vs. Stephen Tuhy, No. 389081.

Due to the fact that the Solicitor General of the United States has selected this case as the test case, no opportunity will be afforded the undersigned to present their views in connection with the determination of the issues involved.

The amount of claimed treble damages in said Municipal Court cases and the rights involved in the case pending in the United States District Court for the District of Minnesota, Fourth Division, wherein the undersigned are attorneys of record, are considerable and substantial and the undersigned therefore request that the Court permit them to file the following brief as *amici curiae* in the above-entitled action.

The attorneys for appellant and respondents have consented in writing to the filing of a brief by the undersigned.

Dated at Minneapolis, Minnesota, this 22nd day of December, 1943.

R. H. FRYBERGER,
1110 Baker Building,
M. R. KEITH,
305 South Fifth Street,
Minneapolis, Minnesota,
Amici Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 464

PRENTISS M. BROWN, AS ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION, *Appellant*,

vs.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR., *Respondents*.

BRIEF AMICI CURIAE

SUMMARY OF ARGUMENT

1. The Emergency Price Control Act of 1942 constitutes an unlawful delegation of power by the Congress to the administrator therein provided for without setting forth adequate standards to limit his discretion and guide him in the administration of the Act.

2. The Act fails to provide for notice and opportunity to be heard before regulations and orders, which the administrator is authorized to promulgate, become effective.

3. The Congress has failed to adopt reasonable means to attain a conceded legitimate end in the control of rents. The means adopted by the Congress are not appropriate, plainly adapted to the end, and are prohibited by and are inconsistent with the letter and spirit of the Constitution in that the said means so adopted are not required by and have no relation to the legislative policy set forth in the

purpose clause of the Act.

4. Contrary to the constitutional requirements, the Act leaves it to the discretion of the administrator to act or not act, even though the statutory standard of the action may be found to exist.

5. The remedy provided for in the Act made available to the landlord upon his claim that any regulation or order promulgated by the administrator is contrary to law, arbitrary or capricious, is so wholly inadequate as to amount to a failure to afford due process of law.

6. Sec. 204 (d) of the Act did not preclude the lower court from exercising jurisdiction to determine whether or not the Act was constitutional, notwithstanding the provisions of Sec. 265 of the Judicial Code (Title 28, U. S. C. A., Sec. 379), and this Court has jurisdiction to review the decision of the lower court in pursuance of the provisions of the Act of August 24, 1937 (Title 28, U. S. C. A., Sec. 349 (a)).

INTRODUCTION

The writers of this brief have not had before them the brief filed by the appellant. It is the purpose of the writers, therefore, to discuss the principles upon which it is insisted that the provisions of the Emergency Price Control Act of 1942 are unconstitutional without reference to the briefs of interested parties.

It is proposed to treat the subject, not from a standpoint of lack of power in the Congress to regulate and control rent under the war power clause (Art. I, Sec. 8, in Constitution), but to attack the manner and means employed in attempting so to do. It is conceded that the Congress has power to regulate rent or act in any other manner having

to do with the requirements for national preservation. It is its duty to act in such connection. As a corollary it will be urged that while rank and file of the citizenry will voluntarily sacrifice and loyally submit to any such control and regulation in war times there is no basis or authority for the Congress to deprive them of, or to require that they give up *justice* and the right to obtain it.

The attempt on the part of Congress to control rents is concededly a war measure, but it is plain that the manner in which the Congress has attempted to do this is neither prompted nor made necessary by the emergencies brought about by the present war. The means adopted by the Congress bear no relation whatever to the emergencies which the Congress has endeavored to meet.

Having in mind that this legislation may be but a step toward the further encroachment upon the rights of the citizen and that, in the early ages of judicial history of this country, this Court has admonished us to always "withstand beginnings," we feel a justification in asking permission to file this brief.

JURISDICTION

No question is raised with respect to the jurisdiction of this Court to hear and determine the issues involved in this case. Such jurisdiction is conferred by Sec. 2 of the Act of August 24, 1937, c. 754, 50 Stat. 752, 28 U. S. C. A. 349 (a).

ARGUMENT AND AUTHORITIES

A.

The Statutory Standards Provided for in the Act Are Insufficiently Defined, Fail to Satisfy the Requirements of Due Process of Law, and Constitute an Unlawful Delegation of Power to the Administrator.

(1) Review of Provisions of the Act.

On the morning of December 7, 1941, this country faced an emergency more ominous than that which confronted it at 4:30 o'clock in April in 1861, when Ft. Sumpter was fired upon. During the days that followed "Pearl Harbor," the entire country was startled suddenly from its lethargy. It did many things impulsively. Congress, activated by that momentum, passed legislation which, in normal time, would have received far more deliberation and circumspection.

Thus, fifty-four days after "Pearl Harbor," the Emergency Price Control Act of 1942 was hurriedly passed, approved, and became a law.

Not only did the Act repose enforcement in an administrator in keeping with the all too popular trend of the times, but it clothed that administrator with a power and discretion to act without the time-honored safeguard of a formula of action and without limitations thereon through clearly announced standards.

The extent to which the Act empowers the administrator to act is limited only by that which is termed *his judgment*. This necessarily precludes the courts and other reviewing bodies from a control of his activities. He is given a right to act without even conducting a hearing. Such power removes the last barrier against arbitrary action which in turn invites disposition.

The following pertinent provisions of the Act, with the

supplied italicizing, will serve to emphasize the foregoing observation and clarify our later argument.

Sec. 302 (d) attempts to define what is termed "defense-rental area." The definition falls far short of a determination *by the Congress* of what is "necessary and proper" under its constitutional grant of power. It provides:

> "'Defense-rental area' means the District of Columbia and *any area designated by the Administrator* as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the provisions of this Act."

The purposes of the Act or the Congressional declaration of policy is incorporated in Sec. 1 (a), where it is stated:

> "It is hereby declared to be in the interest of national defense and security and necessary to the effective prosecution of the present war, and the purposes of this act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increase in prices and rents * * * to eliminate and prevent profiteering * * * and other disruptive practice resulting from abnormal market conditions or scarcities caused or contributing to the national emergency; * * * to protect persons with relatively fixed and limited incomes * * * wage earners * * * from undue impairment of their standard of living * * *"

These purposes are well within the ambit and scope of those entitled to consideration by the Congress in promoting the war effort. However, generalities of these expressions and the undefined words used, coupled with the judgment and discretion lodged in the administrator to follow and interpret them make those generalities the subject of serious consideration from the viewpoint of constitutionality of the Act.

The Act then provides (Sec. 2 (b) and (c)):

> "(b) Whenever *in the judgment of the Administrator* such action is necessary or proper in order to ef-

fectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not *in the judgment of the Administrator* been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator *may by regulation or order establish such maximum rent or maximum rents* for such accommodations *as in his judgment* will be generally fair and equitable and will effectuate the purposes of this Act. *So far as practicable,* in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which *in the judgment of the Administrator*, does not reflect such increases), and he shall make adjustments for such relevant factors as *he may determine and deem to be of general applicability* in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the *Administrator shall, to such extent as he determines to be practicable,* consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, *as*

in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

Sec. 2 (d) provides that the administrator may promulgate regulations and orders to prevent speculation and manipulation and orders relating to recovery of possession of real property whenever in his "judgment" it is necessary so to do to effectuate the general purposes of the Act.

The administrator may make studies and investigations, as *he deems necessary or proper* (Sec. 202 (a)), before promulgating his regulations and orders. After he studies and investigates he may make his orders and regulations without restrictions excepting what *he deems necessary and proper.*

He may require any person to furnish information and keep such records as *he deems necessary* (Sec. 202 (b)) without confining his inquiry to owners of housing accommodations within the defense-rental area.

He may subpoena and require any person to appear before him and produce documents (Sec. 202 (c)).

In establishing his defense-rental area, he may, but is not required to, take official notice of economic data and other facts (Sec. 203 (a)).

Throughout the Act authority is repeatedly given to the administrator to act when *in his judgment* action would be *determined by him to be necessary* to effectuate the purposes of the Act.

(2) The Congress Must Determine What is Necessary and Proper.

Art. I, Sec. 8 (Clause 18) of the Constitution definitely sets out a granted power to the Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *." Within the limits prescribed by the quoted provision of the Constitution the Congress has the power to do anything that may be necessary to the effective prosecution of the present war, but the Constitution plainly points out that such shall be done only by the Congress. The Congress and the Congress alone, is the representative of the people. While it is circumscribed with certain prohibitions in the exercise of its powers in peace time, these prohibitions are sufficiently elastic to permit the expansion of those powers to encompass practically everything that may be necessary to be done to meet the war emergency and preserve the nation intact, provided that it is *the Congress* that does them.

The procedural steps of the enactment of a law by the Congress is sufficient to guarantee to the people it represents that when the Congress has definitely fixed upon the terms of an act it will have done so after every reasonable means has been afforded the people's representatives to inform themselves personally and the Congress collectively of the merits and demerits that attend any proposed bill. These procedural steps themselves guarantee against arbitrary and capricious action through publicity and frank discussions. Consequently, while the measure of guarantee will always be the same whether in peace time or in war, the Acts of Congress may not always be the restricted acts in times of war that may be taken in times of peace. The major consideration, however, is that the measure of protection is lodged in the procedural steps which the Congress is re-

quired to take before the enactment of a law *by it*.

The Constitution does not permit the Congress to provide in the laws it enacts that a designated administrator or some bureau or commission shall have the power "to make all laws which shall be necessary and proper," nor to determine what those laws shall be. If the framers of the Constitution had intended Congress to have such power it would have been granted to the Congress. The Constitution makes the determination of what laws shall be a necessary Congressional act and not an act of some individual. Since the Constitution is one of the granted powers, its words should not be interpreted into a deformed and mis-shapen thing by permitting the power to be exercised by proxy.

A reading of this Act, and particularly those sections to which reference has been made, emphasize that the Congress has attempted to that for which no authority exists. By the terms of the Act, the Congress has placed in the hands of an administrator the power and right to do that which he—not the Congress—determines to be "necessary and proper" to do to carry out the Congress granted powers. The terms of the Act let another think and determine for the Congress. By the terms of the Act, Congress has virtually abdicated, washed its hands of the whole responsibility of determining what is necessary and proper. It has specified a broad field of endeavor in which it has empowered an administrator to function for it, and then only, if and when the administrator deems it "necessary and proper" so to do.

There is nothing in the fact that a great emergency exists which gives the Congress the power to shun a responsibility imposed upon it, and it alone, by the Constitution. There is no relation between the existence of a world war and the giving of an administrator unlimited power to act as his judgment may dictate that permits the Congress to successfully assert that in doing so it resorted to its implied powers.

There is nothing in the fact that a war is on which *prevented* the Congress from doing the legislating. No emergency, regardless of how great, justifies the distorting of the terms of the Constitution to permit Congress to abdicate and let another function in its stead.

The Congress merely determined that the control of rent might be necessary for the effective prosecution of the present war and for the national defense and security. It stopped there. It then provides for the appointment of an administrator to make the determination of what, if any, law there should be to affect that control.

At the time the law was enacted and approved there could have been no way by which that Congresss could have known what, if anything, the administrator would do to control rent. It did not tell him what he should do. It gave him the broad field of rent in which his activities would be employed. It left the matter wholly uncertain as to what, if anything, would *ever* be done by him in the matter of controlling rent.

If rent was to be controlled, Congress should have said so definitely and provided *how* it would be controlled. In failing as it did, the Congress did not determine what was "necessary and proper." It did not even determine that it was necessary and proper to control rent. It only empowered an administrator to make that decision if *he* thought it should be controlled. It follows that the adoption of the Act was not a power exercised by Congress. *It* made no decision on the question of necessity and propriety. It did nothing to carry into effect either its granted or implied powers as contemplated by the Constitution.

The Constitution cannot reasonably be interpreted to mean that the power granted to Congress to determine what was necessary and proper, vested the Congress with a power to set out in an act a field of activity that might or might not

require supervision and transfer the power to an individual administrator to determine whether it should be supervised and, if a determination was made by him then to supervise it, then empower him to adopt the rules affecting the supervision, which rules, when promulgated by him, take on the character of a duly enacted law of Congress subjecting persons to fines, penalties and other punishment on violation.

(3) Unlawful Delegation of Power.

We glean from the decision in *Joseph Schechter, etc., vs. U. S.*, 295 U. S. 495, that the purposes and policy expressed were in substance to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof. The "standard" to accomplish the policy which the Attorney General contended existed were the provisions for formulating, approving and putting into effect "codes of fair competition" to effectuate that policy. Those codes were not to impose inequitable restrictions on admission to membership. They should not promote monopolies, nor should they be designed to eliminate or oppress small enterprises. The codes were not to discriminate against others but were required to effectuate the policy of the Act. Mr. Justice Cardozo aptly characterized such legislation as follows:

> "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. * * * Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into affairs and upon discovery correct them. * * * But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though

it is one that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptance as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well being or prosperity of the industry affected. * * * This is delegation running riot. No such platitude of power is susceptible of transfer. The statute, however, aims at nothing less as one can learn both from its terms and from the administrative practices under it."

With equal force it may be said that the delegation of power to the administrator under the Act here in question is a roving commission, and a delegation of power running riot. The administrator becomes the general agent of the Congress—first, to choose the area for legislation, then to choose the character of the legislation that he believes best suits the area selected for action, and then to promulgate such rules and regulations as he deems necessary and as he sees fit to effectuate the decision that he and he alone is empowered to make. These things he is permitted to do without a semblance of notice to or an opportunity to be heard by those whose rights, property, and even liberty are affected and are at stake.

"The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of law. The first cannot be done; to the latter no objection can be made."

Southern, Statutory Construction, Sec. 68.

The constitutional prohibition against the abdication by Congress of essential legislative functions and what are essential elements to state in a legislative act where an administrative agency is given latitude in executing it is well

stated and set forth in the following decisions:

U. S. vs. L. Cohen Grocery Co., 255 U. S. 81, 65 L. Ed. 516;

Joseph Schechter vs. U. S., 295 U. S. 495;

Panama Refining Co. vs. Ryan, 293 U. S. 388;

U. S. vs. Eaton, 144 U. S. 677;

Lynch vs. Tilden Produce Co., 265 U. S. 315;

Standard Chemicals & Metals Corp. vs. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566;

Wichita R. R. & Light Co. vs. Public Utilities Com., 260 U. S. 46, 67 L. Ed. 124.

The rule with respect to the right to exercise arbitrary power or discretion by an administrator is succinctly stated in 11 *Am. Juris.*, p. 947, Sec. 234:

> "In all cases where a law provides for the exercise of discretion by administrative officers, in order to be valid and escape the taint of unconstitutional exercise of legislative or judicial authority, the discretion must be lawfully exercised in accordance with established principles of justice. It cannot be a mere arbitrary choice, for it has been said that in the American system of government no rule is left for the play and acceptance of purely arbitrary power. A distinction is consequently drawn between a delegation of the power to make the law which necessarily includes a discretion as to what it shall be and the conferring of authority or discretion as to its execution. The first cannot be done, but the second under certain circumstances is permissible."

The only basis upon which it may be effectively argued that the granting of the unlimited discretionary power to the administrator under this Act is proper is that it satisfies the necessitous conditions created by the national emergency. However, there is no relation whatever between the national emergency and the granting of absolute discretionary powers to the administrator. If the power to grant the discretionary

right to act to an administrator can be justified at all it can be justified in peace time as well as in war. The war did not create the need for it. The condition of the times did not demand that it be done that way and, unless it can be sustained on the basis of a war measure, the Act must be construed as unconstitutional.

(4) No Requirement for Notice and No Opportunity to Be Heard Are Provided for in the Act—Due Process of Law Is Ignored.

The right to a notice and a hearing is a constitutional right and the depriving of a citizen of his property without notice and an opportunity to be heard amounts to the taking of property without due process of law.

Sec. 205 (b) of the Emergency Price Control Act imposes the severe penalty of $5,000.00 fine, or imprisonment for not more than two years, in the event of a violation of the regulations promulgated by the administrator. When Congress imposed this penalty it did not and could not have known what the contents of the order or regulation might be upon which it imposed the penalty. Congress merely provided that the administrator may make the law and then, if it is violated, it is punishable. No person can read this Act and find therein what the measure of his conduct must be.

Under the Act, the administrator designates the defense-area and he may do so without any hearing, without making any finding of fact, and without any guidance except that which may be considered Divine (Sec. 302 (b)). When he has determined upon a defense-rental area, be it a state, a county, or one township in a state, or a ward in a city, he issues a declaration setting forth the necessity for and the recommendations with reference to the stabilization of rent for housing accommodations in that state, county, township

or ward (Sec. 2 (b)). The necessity for the fixing of the area is lodged solely in the judgment of the administrator, so that the matter of objections thereto and review thereof are probably properly omitted from the Act because there would be no tribunal which could superimpose its own judgment upon that of the administrator and declare that the administrator did not exercise his judgment.

The administrator sets forth in his declaration the necessity for fixing the area. Since he is required to take no testimony and make no finding, it follows that his declaration of necessity for fixing the area as he did, or does, is a matter purely of his own conclusion. Yet no person can complain.

If, within sixty days after the issuance of such recommendations by the administrator the rents are not stabilized in the area by state or local regulations, or otherwise, in accordance with the administrator's recommendations, the administrator may establish the maximum rents for the accommodations in the area. When he fixes the maximum rent he does so solely on the basis of what they, in his judgment, should be to fairly and equitably effectuate the general purposes of the Act.

If the state or local authorities should act contrary to the administrator's recommendations, the administrator's recommendations must prevail and he may establish the maximum rents regardless of what local authorities might consider reasonable and proper to effectuate the purposes of the Act in rent stabilization therein. Since local conditions may differ in different localities, and since opinions may differ in localities as to the proper stabilization of rents for that area, notice and opportunity to be heard before the area is designated and the maximum rents established is a constitutional prerequisite.

In *Minneapolis & St. Paul R. R. Co. vs. State of Minnesota*, 134 U. S: 418, 457, this Court aptly points out that:

"* * * all that the Commission is required to do is, on the filing with it by the railroad company of copies of its schedules of charges, to 'find' that any part thereof which is, in respect, unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charges as the Commission 'shall declare to be equal and reasonable,' and to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declare what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law."

Later this Court further expounded on the principles under the Fifth Amendment in *Southern R. R. Co. vs. Virginia*, 290 U. S. 190, 194, as follows:

"If we assume that by proper legislation a state may impose upon railways the duties of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. Undoubtedly, the Acts do give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding not subject to general review, to ordain that expenditure shall be made for erecting a new structure. The thing so authorized is no mere police regulation.

* * * * * * * * * * *

"Under circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.

* * * * * * * * * * *

"The infirmities of the enactment are not relieved by

an indefinite right of review in respect of some action spoken of as arbitrary. Before his property can be taken under the edict of an administrative officer, appellant is entitled to a fair hearing upon the fundamental facts."

Later, in *Morgan vs. U. S.*, 298 U. S. 468, the Court reviews this doctrine:

"The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to the legislative action in the fixing of rents of market agencies. And, while the order is legislative and gives to the proceeding its distinct character—(*Louisville & N. R. Co. vs. Garrett*, 231 U. S. 298, 307, 58 L. Ed. 229, 240, 34 S. Ct. 48) it is a proceeding which by virtue of authority conferred has special attributes. The secretary, as the agent of Congress in making the rates must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable or discretionary.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. The duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing, there must be evidence adequate to support pertinent and necessary findings of fact. * * * Hence, it is frequently described as a proceeding of quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts."

When, as here, it is within the power of the administrator issuing the order, in his discretion, to make the order operative in one way upon one person, in another way upon another person, or not at all on thousands of other persons in exactly the same situation, the result is the taking of prop-

erty of the person or persons from whom it exacts obedience, and the mandates of the Fifth Amendment require notice and hearing to assure justice.

If my neighbor's property is situated across the street, outside of the area designated by the administrator, and his property is not affected and mine is, I have a right to a hearing to determine whether or not my property shall be taken and his left undisturbed. If I rent my property for $50.00 per month and my neighbor rents an identical property at $65.00 per month, and we are both in the rental area, and my property is of a rental value of $75.00 per month, but out of consideration for my tenant my rents have been maintained on a lower level, if my rent is to be frozen at the reduced rate when costs of maintenance and commodities necessary in its operation are progressively increasing, I am entitled to notice and hearing before the freezing of my rent; otherwise I am being deprived of my property without due process of law. I am entitled to know on what basis the administrator arbitrarily fixes the freeze on my rent and if I am deprived of the right to appeal from his decision, be it arbitrary or not, I am being deprived of my property without due process of law.

Cases sustaining that contention are:

Panama Refining Co. vs. Ryan, 293 U. S. 388, 341, 79 L. Ed. 446, 464;

Wichita R. R. & Light Co. vs. Public Utilities Com., 260 U. S. 48, 58, 67 L. Ed. 124, 130;

Mahler vs. Eby, 264 U. S. 32, 43, 68 L. Ed. 549, 556;

Allegheny, Topeka & Santa Fe Ry. Co. vs. U. S., 295 U. S. 193, 202, 79 L. Ed. 1382, 1390;

Morgan, et al., vs. U. S., 298 U. S. 468, 479, 80 L. Ed. 1288, 1294;

Florida vs. U. S., 282 U. S. 194, 215, 75 L. Ed. 291, 304;

Twin City Milk Producers Ass'n vs. MacNutt, etc., 122 F. (2d) 564, 566, 567;

Saginaw Broadcasting Co. vs. Federal Communications Com., 96 F. (2d) 554, 559;

Oklahoma Operating Co. vs. Love, 252 U. S. 331, 335, 64 L. Ed. 596, 598;

Boeing Air Transport vs. Farley, 75 F. (2d) 765, 767.

When the administrator makes a declaration that, in his judgment, the defense-rental area should be established and after establishing it, determines what the maximum and minimum rents to be charged in the area shall be, he has made a finding as to what is his judgment. How can his judgment be challenged on the ground that the finding is unsupported by any fact when in the matter, the judgment of the administrator is the standard by which to measure the sufficiency of the basis? Attack is foreclosed and by that token the Act violates the fundamental concepts of the Constitution.

Deaver, J., in *Payne vs. Griffin* (p. 36, Statement as to Jurisdiction), discusses the same point. He says:

> "People know that they are charged with knowledge of the law but, without actually knowing the law, they have been accustomed to make defenses only when the law is sought to be enforced against them. An Act which permits an administrator to fix prices without notice or hearing and then makes those prices conclusive after sixty days, would, in practical operation, have the effect of cutting off defenses. This is especially true where the procedure provided makes it too inconvenient and expensive for individuals in some cases to follow the procedure."

Again it is emphasized that there are no circumstances in the existence of a national emergency which justifies the cutting off of a right to a hearing and the requirement of a finding of fact and a right to review. No relationship can be shown between the existence of such emergency and the de-

priving of the right. If the taking can be justified at all the right could be taken away with equal justification in times of peace as in times of war.

(5) War Does Not Nullify Constitution Nor Suspend Its Operation—Congress Is Still Required to Adopt Reasonable Means to Attain a Legitimate End.

One of the most pernicious prolations ever propounded on the theory of legislation or attempted legislation, and in rules or regulations of governmental agencies, is that which seeks to render elastic to a point of stretching beyond endure, the oft-quoted dictum that the Congress possesses power not only expressly delegated by the basic law, but also such as the Congress or the bureau determine is necessarily implied. Such a doctrine presupposes that we are to assume that an authority must exist to determine what are *necessary* powers in order to give effect to those expressly granted. It is asserted that that doctrine is for Congress alone to determine the occasion or necessity for expansion of this ambit and not for the courts to usurp that function by constrictive adjudication. In other words, it is contended that on the questions of what is, and what is not a necessarily implied power to carry into execution those powers expressly delegated, the determination of Congress is final and forecloses any further judicial review or inquiry. The position lately taken by the exponents of this doctrine in defining Congressional power, is that, however remote the subject of legislation may be from the exercise of a delegated power under the Constitution, if it have the slightest conceivable bearing on that express power, the edict in the law that it is designated to implement it shall preclude further inquiry as to its necessity to that end.

It is our belief, however, that the principles expounded

by and adhered to by this Court in *Carter vs. Carter Coal Co.*, 298 U. S. 238, must still be recognized, and that neither expediency nor liberality shall serve to justify a departure from the traditional bounds of judicial inquiry. In the *Carter* case this Court says:

> "The ruling and firmly established principle is that the powers which general government may exercise are only those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an Act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. Legislative Congressional discretion begins with the choice of means and ends with the adoption of the methods and details to carry the delegated power into effect. The difference between these two things—power and discretion—is not only very plain but very important. For while the powers are rigidly limited to the enumerations of the Constitution, the means which may be employed to carry the powers into effect are not restricted, save that they must be appropriate plainly adapted to the end, and not prohibited by, but consistent with, the letter and spirit of the Constitution. *M'Culloch vs. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579, 605. Thus, it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution all ways are closed."
>
> See *National Labor Relations Board vs. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 81 L. Ed. 893;
>
> *Fed. Power Commission vs. National Gas Pipe Line Co.*, 86 L. Ed., p. 713.

Since the existence of a state of war does not suspend, enlarge, or change the granted powers of Congress, the pertinent inquiry is, has the Congress, in adopting the Act before the Court, employed means that are appropriate, plainly adapted to the end and not prohibited by but consistent with the letter and spirit of the Constitution? In other

words, has the Congress adopted reasonable means to attain a legitimate end, of keeping rents within prescribed limits, to protect the landlord and others in their fixed incomes.

No implied power rests in Congress because of its war power to fix rents at a certain date. There is no relation between the existence of war and the freezing of rents on the first day of March, 1942. The existence of war is not the element then which fixed the date of freezing. Wherein does there exist the implication that the granted power of the Congress, devised and bequeathed to the administrator, veneers his acts in arbitrarily freezing rents at a post dated base period, so that judicial inquiry as to its appropriations is prohibited?

It might be stated as a Congressional policy that it became necessary for Congress to control rents to prevent speculative and abnormal increase, to prevent other disruptive practice resulting from abnormal market conditions or scarcities or in the intent of national defense or to protect persons of relatively fixed income or to prevent a post emergency collapse of values. The mere announcement of the policy does not enlarge or restrict the granted power. There is no reasonable connection between the announced policy and its attempt to fix rents and freeze them as of a certain date to accomplish those purposes. By the same token there is no implication that gives it the right to permit any administrator to fix them for the Congress as of that date.

The preventing of any increase of rent over that which prevailed in a base period, arbitrarily selected, is not justified when the cost of maintenance of a landlord's property is increased to an extent that would justify a reasonable increase in his rent over that which prevailed on the base date. (See National Industrial Conference Board report on living costs.) The unreasonableness of the procedure is magnified when the freezing or fixing of rent as of bate date antedates the act

of freezing. A base date for rent is selected at a period when the cost of maintenance of premises had *already increased* to justify the increase in the rent that prevailed on the date of act of freezing.

The reasonable means to attain this legitimate end and to effectuate the purposes of the Act was necessarily restricted to freezing rents at a base reasonably arrived at, for instance, by taking into consideration the cost of the landlord's capital investment, the cost of maintenance, and a reasonable return on his investment. Such a base would have had a direct relation to conditions contributing to the national emergency. Such a base would have given a true effect to the purposes of the Act. Had Congress adopted such a plan and designated an administrator for the administration of it, little complaint could have been interposed to the constitutionality of the Act. Such a law would have provided a sliding scale permitting the landlord to retain his fixed income on the basis of maintenance, whether it be up or down. Such procedure would be simple and expedient. Its administration would not have been any more complicated than ascertaining depreciation of real estate for deduction for income tax purposes. Such an act would have met the requirements of the rule announced in the *Carter* case as adopting means that were appropriate, plainly adopted to the end, and not prohibited by, but consistent with the letter and spirit of the Constitution. *Such a plan was within the power of the Congress to adopt.*

Neither the war power, nor the implied powers under the Constitution justify the freezing of rents and the fixing of the maximum amount to be charged for the use and occupation of property in the manner in which is attempted to be done under this Act.

The answer to some pertinent questions will serve to remove the point from the field of contention. Is it necessary

in the interest of national defense and security, and necessary to affect prosecution of the present war to deprive a citizen of a reasonable return on his investment because it happened to be in rental property? Is the war effort furthered by depriving him of his right to a day in court in the county or district in which he lives when he is suffering an injustice caused by arbitrarily placing him in a defense-rental area and thereby depriving him of his right to contract freely? Likewise, is the present war more effectively prosecuted by imposing on the landlord a minimum of $50.00 remedial damages for each week or each day for an overcharge no matter how small it may be, and thereby confiscate his property for what might have been a mere inadvertent act on his part? Is it necessary for said purpose to make provision in an act in such a way as to enable a tenant claiming he did not know his rights at an earlier date, if his rent was payable weekly, to recover of his landlord a judgment of $2,600.00 a year, or, if his rental unit was by the day, recover a judgment of $18,000.00 a year? Is the national security furthered by leaving nothing to the trial court to do but assess the remedial damages? Are these means to the legitimate end of protecting the national defense or security and to effectively prosecute the war? Are these things plainly adapted to this end?

To say that the Congress has the right to inaugurate such a program under a law because of its war powers, or to permit an administrator to make them effective as a law, and to say further the Congress is the sole judge of whether it is right or wrong so to do, is wholly and entirely foreign to any recognized concept of justice or Congressional power.

(6) No Requirements Are Set Up to Evoke Administrative Action—When He Has Acted His Action Cannot Be Challenged Except That They Are Not in Accordance With Law, Are Arbitrary and Capricious—the Exceptions Are Without Meaning.

Sec. 204 (b) of the Act provides that, "No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the Court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious." Relief can be obtained only through the Emergency Court of Appeals created by the Act (Sec. 204 (a)).

Had the Congress incorporated into this law a provision that it would operate only in the county of Hennepin, state of Minnesota, notwithstanding it was recognized that like or similar conditions existed in other counties of the state of Minnesota which required coverage to effectuate the purposes of the Act, the Act would have been clearly void. (*U. S. vs. Yount*, 267 Fed. 861, and cases therein cited.) Inconsistent as it may seem, the Congress has empowered the administrator to do this for it. In other words, Congress has placed it within the power of an administrator to do the very thing that Congress itself is foreclosed from doing.

A review of the Act will disclose that in many instances the action of the administrator is prefaced by the permissive "may." We are not unmindful of the fact that in the statutory construction the context of the statute wherein is used the word "may," may be construed to mean "shall." This statute cannot be so interpreted and give it life and meaning because in those instances where "may" is used with respect to action of the administrator, it is further modified by the provision that he may act *if in his judgment he determines so to do.*

Assume the administrator, in accordance with the power vested him under Sec. 302 (d) establishes the county of Hennepin, state of Minnesota as a defense-rental area and freezes rents therein as of March 1, 1942. Assume conditions of like character as exist in Hennepin County, prevail in Ramsey County. The residents of Hennepin County bitterly complain on the ground that the administrator has singled them out and arbitrarily froze the Hennepin County rents when he should have also placed the maximum on Ramsey County rents. No court could issue its mandate successfully requiring the administrator to likewise freeze the rents in Ramsey County because the Court immediately meets the barrier which could be asserted by the administrator that it was *his judgment* that it was necessary and proper to effectuate the purposes of the Act to freeze the rents in Hennepin County and not in Ramsey. No court could hold that the administrator did not act according to *his own judgment*. The administrator could successfully assert that he acted according to law because the law gives him the right to act on his own judgment. His actions are not arbitrary or capricious because he could claim and none could gainsay the fact that it was his honest judgment, that it was not necesary to touch the rents in Ramsey County to effectuate the purposes of the Act. The only possible decision on the application for such a mandate would be dismissal of the application therefor. The position of the administrator thereby became invulnerable. This analysis should prompt a voidance of the Act under the holding in the *Yount* case.

The provisions of the Act permit the administrator to take action or not take action as he sees fit. There is no remedy in a complainant if the administrator acts when he should not act or if he fails to act when he should act. It is fundamental that to clothe an act with constitutional mantle the Act must exact activity

from the administrative officer when a specified state of facts or congeries of circumstances sought to be legislated upon by the Congress, is found to exist. When the Act leaves it to the discretion of the functionary to act or not act when the statutory standard of action is found to exist those fundamentals are wholly lacking. Not only is all *supervisory* direction of the agent then extinct but he is left to motivation as satisfies his whim and fancy. Even expediency cannot justify such legislation.

Panama Refining Co. vs. Ryan, 293 U. S. 388, 79 L. Ed. 446;

Schechter Poultry Corp. vs. U. S., 295 U. S. 495, 79 L. Ed. 570.

(7) Remedy Afforded for Relief Is Not Within the Spirit or Intent of the Constitution and Is Not Due Process.

The administrator under the Act is empowered to designate a defense-rental area as may be determined by him (Sec. 302 (b)). When that designation is made it becomes final. From the administrator's designation there is no appeal. So there is set up a program which makes an administrative order effective and binding not only *before* but *without* a hearing, contrary to the recognized concept of due process.

Opp Cotton Mills vs. Administrator, 312 U. S. 126.

He then promulgates a regulation or order which in effect becomes a law fixing the rent for that area. He may fix those rents at a base period any time from April 1, 1940, to the present time (Sec. 2 (b)). When he fixes a base which in his judgment is fit and proper and promulgates his regulations all landlords in that area are automatically subjected thereto and violation of his order immediately becomes a penal offense. It is to be noted that the landlord had noth-

ing to do with fixing either the area or the base period. He has had no opportunity to be heard up to that point. He immediately becomes subject to a law enforcible by all of the powers exercised by the United States. But this is a law formulated, fixed and promulgated by one individual. The subjected landlord's next-door neighbor, who happens to reside beyond the limits of the area designated, is not subject to that law and can rent his premises on such basis as the economic law of supply and demand affords him the opportunity.

Should the landlord in the area and subject to the regulation feel himself aggrieved by it he may file a protest with the administrator (Sec. 203 (a)). In order to prepare an effective protest, the landlord must employ an attorney; otherwise, through technicalities, he would find himself in a position where relief could not be afforded him. It will be observed that if the protest is denied and an appeal is taken to the Emergency Court of Appeals, in that Court,

> "No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objections shall have been set forth by the complainant in the protest, or such evidence shall be contained in the transcript" (Sec. 204 (a)).

In order to effectively prosecute the protest before the administrator the attorney's presence before the administrator is imperative. This means that a landlord must meet the expense not only of an attorney preparing the protest, but of his expenses and *per diem* to Washington to appear before the administrator.

The Act (Sec. 203 (a)) does not specify the grounds that must be contained in the protest supporting the landlord's objections to the regulation. Therefore there is lacking a standard by which the administrator is to be governed when

he acts upon the protest.

If the protest is denied then the aggrieved landlord may file a complaint with the Emergency Court of Appeals and serve a copy on the administrator. The only grounds on which the Emergency Court of Appeals is permitted to enjoin or set aside the regulation are that the regulation "is not in accordance with law, or is arbitrary and capricious" (Sec. 204 (b)). Since no provision is made for taking testimony before the Emergency Court of Appeals, it must be presupposed that the original protest filed with the administrator must show that the administrator's regulation is not in accordance with law or is arbitrary and capricious, because this is the foundation for the jurisdiction of the Emergency Court of Appeals. Such grounds must be incorporated in the appeal complaint with respect to the protest. The Emergency Court of Appeals entertains no objections unless they are set up by the complainant in the protest. It follows that little, if any, hope for success could be held out to the landlord in his protest to the administrator because it is hardly to be supposed that the administrator, having once established the regulation or order, would concede that it was not in accordance with law, and certainly he would not concede that it was arbitrary or capricious.

To effectively prosecute the complaint before the Emergency Court of Appeals, the landlord is of necessity forced to retain counsel and again meet the *per diem* fee and expense of a second trip to Washington.

This procedure from a practical standpoint forecloses a landlord from ever contesting the validity of a regulation unless the amount of rent involved is substantial. Ordinarily the landlord's rent increase does not involve over $5.00 or perhaps $10.00 per month to a tenant. In the usual case one landlord, with one tenant, with a possible $60.00 to $120.00 per year increase in rent would be involved. It is

obvious that the expense of obtaining relief makes the pursuing of the remedy so out of proportion to the possible beneficial results to be obtained that it deprives him of the remedy itself. The relief, if obtained, would be so remote in time from the happening of the event as to wholly discourage any attempt to obtain it. By the time it was obtained the landlord would no doubt have lost his tenant by expiration of the rental term.

In the meantime the landlord must either comply with the regulation and fix his rent at the arbitrarily antedated base or he is subjected to prosecution under Sec. 205 (b). Under the regulations promulgated by the administrator, he cannot oust the tenant from the premises. Should the landlord arbitrarily or inadvertently collect rent in addition to the ceiling figure an accumulative remedy is reposed in the tenant to collect from the landlord treble the amount of the excess of rent charged over the ceiling figure, or $50.00 per month, whichever is the greater, together with attorney's fees. The remedy for the collection of the penalty and attorney's fees is given to the tenant in the local courts of his residence, but the remedy of the landlord is not to be found there.

In the meantime if the amount involved in the landlord's justifiable increase in rent does not warrant him in pursuing the remedy above outlined, he must comply with the regulation or is subject to the criminal features of the Act. Such prosecution takes place in the Court having jurisdiction in the place of his residence. But the landlord's remedy is not to be found there.

The tenant and the government are given the right to proceed in the local courts. The landlord gets no hearing except in Washington, D. C.

In the criminal proceedings the landlord's right to attack the validity of the regulation is taken away from him. The

Court in which he is prosecuted criminally has no jurisdiction to pass on the validity of the regulation which it is claimed the landlord violated. Regardless of whether the regulation was in accordance with law, and regardless of how utterly arbitrary or capricious it may have been, the only issue before the Court trying him criminally is whether or not the landlord wilfully violated any regulation. If he knew the regulation and violated it, it follows as a matter of law, that his violation is wilful and his punishment must be inevitable regardless of how unlawful the regulation might be, regardless of how arbitrary and capricious it may be, regardless of how much the landlord may have desired to pursue the remedy before the administrator and the Emergency Court of Appeals but did not do so because of the expense involved. He must still comply with the regulation or the criminal penalties fall on him.

Because these so-called remedial steps are incorporated in the Act, it is said that the Act must be constitutional. If these are remedial procedures in the sense that they have always been recognized in this country, then may not the next Act passed by Congress (if this is held constitutional) provide still another court where the aggrieved party may be compelled to go to obtain part of his remedy, thus dividing up the jurisdictions of courts all over the country? May not the next Act provide that the first step be taken in Washington, the next step in California, and the next one in Texas, and when the remedy is either given or denied in either Court as progress is made step by step through them, other courts are ousted of jurisdiction.

If it is to be determined that the availability of courts for relief may be removed from litigant by distance and excessive costs, then may not the availability of courts be removed from litigants by other means? When availability of courts for relief is removed from litigants by any reason

it is the end of personal and property rights and protection. Due process of law is then no more.

There is nothing about the existence of a condition of war or a national emergency that makes it necessary that relief be denied a citizen in the courts of his residence. There is no relation between the preservation of the national defense and security that makes it necessary that a citizen be deprived of the convenient right to resort to his local court for his remedy. There is nothing in existing conditions that makes it necessary that the right to contest the action on the part of an administrator be so far removed from the affected party as, from a practical standpoint, to deprive him of his remedy by a resort to the local court.

It will be conceded that technically, and by processes of legerdemain, the remedy is preserved, but it is wasted into a shadow and its substance is gone. Such was never the intent expressed by the framers of or those who expound the Constitution. To sustain a law wherein is offered a mere gesture toward a remedy is, indeed, sanctioning a dangerous precedent. All recognized conceptions of due process are violated and it is gone. In this program of legislative lethargy there is lost the "cherished judicial traditions embodying the basic concept of fair play."

Morgan vs. United States, 298 U. S. 468, 56 S. Ct. 906.

B.

The Position Taken by the Lower Court That It Was Not Necessary to Decide Whether Sec. 204 (d) of the Act Was Unconstitutional, Should Be Sustained.

That part of Sec. 204 (d) of the Emergency Price Control Act, material for consideration here, provides:

"Except as provided in this Section, no court, Federal, State, or Territorial, shall have jurisdiction or pow-

> er to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

Aside from and without discussing the doubtful constitutionality of such a provision, it was not controlling on the issues before the District Court in the case at bar.

The lower court had before it issues to be determined tendered by pleadings and contentions on the part of the respective parties. The administrator contended that the defendant, Mrs. Willingham, had engaged in acts and practices which constituted violations of the Emergency Price Control Act. We are not interested in what those violations were. For the purposes of this review the fact that the claims were asserted is sufficient for our purposes. The administrator further charged that the judgment entered in the Superior Court of Bibb County, Georgia, was utterly void as that court was without jurisdiction to entertain the petition upon which it was based. The claim was that the state court had been divested of such jurisdiction by force of the provisions of the said Sec. 204 (d). By making such claims the administrator invited the defendants to interpose and assert any and all defenses that they might have to the claims which the administrator asserted. The administrator, by commencing the action in the United States District Court for the Middle District of Georgia, Thomasville Division, invoked the jurisdiction of that court and by so doing placed himself in a position where a decision of that court on either the law or the facts would be controlling.

Reserving any comments embracing constitutional questions, and for the purposes here, we agree with the conten-

tion of the administrator that his right to commence the instant action was authorized by the terms of Sec. 205 (a) of the Emergency Price Control Act, notwithstanding the provisions of Sec. 265 of the Judicial Code (U. S. C. A., Title 28, Sec. 379), which provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In *Toucy vs. New York Life Insurance Co.*, 314 U. S. 118, 62 S. C. Rep. 139, Mr. Justice Frankfurter reviewed the legislative history of this Act, and stated:

> "Regardless of the various influences which shape the enactment of Sec. 5 of the Act of March 2, 1793, the purpose and direction underlying the provisions is manifest from its terms: proceedings in the state court should be free from interference by federal injunction. The provision expresses on its face the duty of 'hands off' by the federal courts in the use of injunction to stay writ in a state court."

It is stated in the opinion in the *Toucy* case that while the Act had had little if any legislative review during the many years it has been in force some legislative review had taken place, and it is stated:

> "In the course of one hundred and fifty years, Congress has made few withdrawals from this sweeping prohibition."

The decision then enumerates those withdrawals, namely: (1) bankruptcy proceedings; (2) removal of actions; (3) limitation of ship owners' liability; (4) interpleader; (5) Frazier-Lemke Act. It is not certain what is meant in the opinion by legislative review, but the fact that the Congress has made the various exceptions indicates that the Congress had indulged in some review. To that extent evidence

is of the fact that the Congress never intended to foreclose its right to make exceptions by way of withdrawals should the occasion warrant so doing. The making of the exception by way of withdrawals is not foreign to the legislative policy expressed in the Judicial Code.

Consequently, it is apparent that when the Congress made the sweeping provision which it did in Sec. 204 (d) of this Act, little doubt remains but what the Congress intended to make the Emergency Price Control provisions a further withdrawal from the Act and has done so in terms that are unequivocal. The point we make is that, so far as the determination of the issues in the case below, the Court was within its rights in passing the question of the validity of Section 204 (d) in its amendatory order of September 14th, 1943, as the lower court could properly take the position that Sec. 204 (d) was an additional exception adopted by Congress to the prohibition fixed by Sec. 265 of the Judicial Code.

There was no occasion for the lower court to pass on the validity of Sec. 204 (d) since the issues tendered to it could be completely determined by exercising jurisdiction under its general power to pass upon the constitutionality of any Act of Congress.

> "Jurisdiction is the power to decide a justiciable controversy and includes questions *of law as well as facts.*" (Emphasis ours.)
>
> *Benderup vs. Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308.

With respect to the issues tendered by the administrator to the lower court the defendants interposed the defense of the constitutionality of the various provisions of the Emergency Price Control Act and particularly their right as citizens to test the validity of the Emergency Price Control Act in the state courts of Georgia.

To determine these issues it was within the realm of propriety for the lower court, not only to determine whether or not the defendants were violating any provisions of the Act or regulation and whether the defendants had a right to contest the validity of the Emergency Price Control Act in the state court, but it had the further right to pass upon the validity of the Act itself, upon which the moving party based his right for relief.

We are impressed with the discussion by Judge Deaver on the responsibilities attendant upon him to render judgment in accordance with his determination of whether an act was valid or unconstitutional. He wholesomely asserts that, when a court is called upon to render a decision, it is required to go all of the way and decide all of the issues. True to legal tradition he would not permit himself to be swayed from that course by any provision in the Act itself that might attempt to direct him to render a decision one way or another, regardless of his own personal views of the matter.

The lower court was presented with issues which brought to the surface the question of the constitutionality of the whole Act upon which the administrator had based his right to relief, and he says (p. 25, Statement as to Jurisdiction):

> "If a court has jurisdiction to try a case, it has inherent power to determine whether an act on which the existence of the right of action depends, conforms to the Constitution."

The last statement on the subject will be found in *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. vs. Missouri-Kansas-Texas R. Co., et al.*, decided November 22, 1943, Vol. 64, S. Ct. Rep., pp. 146, 153, wherein Mr. Justice Douglas states:

> "When a court has jurisdiction it has of course 'au-

thority to decide the case either way.' *The Fair vs. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716."

If Sec. 204 (d) establishes an additional exception to Sec. 265 of the Judicial Code, then, without question, the lower court had jurisdiction to try and determine the case at bar. If it had jurisdiction to try and determine, then it had the right to try and determine it in such way as that lower court felt was in accordance with law. Its decision made therein became final, subject only to review by this Court. This Court's review of that decision is hardly to be questioned in view of the provisions of the Act of August 24, 1937 (c. 754, Sec. 2, 50 Stat. 752, Title 28, U. S. C. A., Sec. 349 (a)).

CONCLUSION

The Congress has indeed departed noticeably in recent years from the precept of Thomas Jefferson that "Government is best which governs least." Whether Jefferson had the thought in mind or not is not known but retrospectively he may be said to have thought that enactments similar to the one under consideration in this case, are the subtle and insidious first steps toward ultimate loss of liberty and rights now guaranteed to the citizens of this country by the Constitution. It is this type of legislation whereby power is gathered by a few, to the permanent and irrecoverable loss of the many. It is in fact usurpation, and in his wisdom Jefferson was undoubtedly predicting such a course might be attempted.

That many wrongs have been committed, because of the power lodged in a few by the wording of this Act, is evidenced by the testimony offered before the Select Committee to Investigate Acts of Executive Agencies Beyond the Scope

of Their Authority. The first report, printed as Union Calendar No. 236, contained these words:

> "Public Law 421, 77th Congress, creating the Office of Price Administration, grants too broad a discretionary power to the administrator and fails to provide a sufficiently clear definition of his power to guard against its abuse and to adequately safeguard the constitutional rights of citizens" (p. 3).

The second intermediate report of this same committee, printed as Union Calendar No. 301, states:

> "The Price Control Act vested broad and tremendous powers in the Price Administrator" (p. 4).
>
> "With the narrow limitations, both on the scope of review and extent of relief which the court may grant, your committee submits that it will be very rare when the court will be able to determine any decision of the administrator is 'arbitrary and capricious' and that therefore the scope of the judicial review provided as a safeguard in the Act is so small as to be almost nonexistent" (p. 8).
>
> "With top officials of the Office of Price Administration entertaining the opinion that Congress lacks understanding of the legislation it has enacted, your committee ceases to wonder at the frequent misinterpretations given by the agency to its guiding statutes" (p. 12).

From these reports one almost concludes that the Congress in enacting this law looked upon the Constitution somewhat as the school boy defined it as "that part in small print, in the back of the book, which nobody reads."

There are those, however, who are beginning to realize the dangerousness of the trend evidenced by this legislation. We hope others will realize it before it is too late. The Honorable Hatton W. Sommers has recently written (September, 1943, Reader's Digest, p. 4):

> "If we think Hitler's system is better than ours, we

should have the honesty to say so instead of copying it while we denounce it."

Freedom was lost in Germany because those Machiavellian initial steps were not met and combatted by the citizens of that country. They failed to heed the admonition long ago promulgated by our courts that we should always "withstand beginnings." When Hitler first rose to power, he did it through what appeared to be legal means. He became Chancellor. The Reichstag failed to perform its functions and delegated its powers to him. Eventually, the Reichstag, having no further powers to give away, sank to the level of a common clique and awoke to the fact that Hitler had established a dictatorship in Germany.

Unless legislation such as this has the stamp of disapproval the ironic might have factual basis in that we would be spending our blood and property to establish liberty in Europe and lose that liberty at home.

It should not be forgotten that every step taken backward by mankind in its long fight for freedom has been made under the guise of some reform or in the name of patriotism while facing a foreign enemy. The case of Germany is but the latest example of this truism. As a nation we are less likely to succumb to some power from without and thus lose our liberty, than we are to be beguiled by the machinations of those within.

The type of legislation here under discussion is not merely vicious as being loosely drawn and carelessly worded. It is worse than that. It is wicked in its potential deadliness to our form of government. It departs entirely from the thought expressed by Thomas Paine that "A Constitution is not the act of a government, but of a people constituting a government," and when those in authority attempt to act outside the constitutional limitations they are asserting a power without a right granted by the people.

When the Constitution, which is the instrument through which we govern ourselves by right, is disregarded in any small detail, or by any means, no matter how trivial, or no matter under what guise—whether patriotism or emergency, it is high time that we individually counsel ourselves to protect that which has been so dearly bought and which may be lost so easily. The highest law of wisdom in a people having the noble heritage of liberty is to spend such care and thought upon the enactment of those laws as well as reviewing them for validity that not only shall there be no question of any loss of even a small portion of our freedom, but that no injustice or inequality may be committed thereunder without there be granted a speedy remedy.

Only the word of God should be held in greater reverence than the words of our Constitution. If we are to continue to be a free people we must guard as a sacred duty both the words and the meaning of our "Constitution Forever."

With these observations it is respectfully submitted that the Emergency Price Control Act of 1942, and particularly the rental control section thereof, is unconstitutional and void, and the rules and regulations promulgated thereunder are without force and effect and that the decision of the lower court should be affirmed.

Respectfully submitted,

M. R. KEITH,
305 South Fifth Street,
R. H. FRYBERGER,
1110 Baker Building,
Minneapolis, Minnesota,
Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 464.—October Term, 1943.

Chester Bowles, as Administrator of the Office of Price Administration, Appellant, *vs.* Mrs. Kate C. Willingham and J. R. Hicks, Jr.	Appeal from the District Court of the United States for the Middle District of Georgia.

[March 27, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

Appellee, Mrs. Willingham of Macon, Georgia, sued in a Georgia court to restrain the issuance of certain rent orders under the Emergency Price Control Act of 1942 (56 Stat. 23, 50. U. S. C. App. (Supp. II) § 901) on the ground that the orders and the statutory provisions on which they rested were unconstitutional. The state court issued, *ex parte*, a temporary injunction and a show cause order. Thereupon appellant, Administrator of the Office of Price Administration, brought this suit in the federal District Court pursuant to § 205(a) of the Act and § 24(1) of the Judicial Code to restrain Mrs. Willingham from further prosecution of the state proceedings and from violation of the Act, and to restrain appellee Hicks, Bibb County sheriff, from executing or attempting to execute any orders in the state proceedings. The District Court in reliance on its earlier ruling in *Payne* v. *Griffin*, 51 F. Supp. 588, dismissed the Administrator's suit on bill and answer, holding that the orders in question and the provisions of the Act on which they rested were unconstitutional. The case is here on direct appeal. 50 Stat. 752, 28 U. S. C. § 349(a).

Sec. 2(b) of the Act provides in part that, "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area." Pursuant to that authority the Administrator on April 28, 1942, issued a declaration designating twenty-eight areas

in various parts of the country, including Macon, Georgia, as defense-rental areas. 7 Fed. Reg. 3193. That declaration stated that defense activities had resulted in increased housing rents in those areas[1] and that it was necessary and proper in order to effectuate the purposes of the Act to stabilize and reduce such rents. It also contained a recommendation pursuant to § 2(b) that the maximum rent for housing accommodations rented on April 1, 1941, should be the rental for such accommodations on that date;[2] and that in case of accommodations not rented on April 1, 1941, or constructed thereafter provisions for the determination, adjustment, and modification of maximum rents should be made, such rents to be in principle no greater than the generally prevailing rents in the particular area on April 1, 1941. The declaration also stated in accordance with the provisions of

[1] The declaration recited that the designated areas were the location of the armed forces of the United States or of war production industries, that the influx of people had caused an acute shortage of rental housing accommodations, that most of the areas were those in which builders could secure priority ratings on critical materials for residential construction, that new construction had not been sufficient to restore normal rental markets, that surveys showed low vacancy ratios for rental housing accommodations in the areas, that defense activities had resulted in substantial and widespread increases in rents affecting most of these accommodations in the areas, and that official surveys in the areas had shown a marked upward movement in the general level of residential rents.

[2] Sec. 2(b) provides: "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area."

§ 2(b)[3] that if within sixty days after April 28, 1942, such rents within the areas in question had not been stabilized or reduced by state or local regulation or otherwise in accordance with the Administrator's recommendation, the Administrator might fix the maximum rents.

On June 30, 1942, the Administrator issued Maximum Rent Regulation No. 26, effective July 1, 1942, establishing the maximum legal rents for housing in these defense areas, including Macon, Georgia. 7 Fed. Reg. 4905. It recited that the rentals had not been reduced or stabilized since the declaration of April 28, 1942, and that defense activities had resulted in increases in the rentals on or about April 1, 1941, but not prior to that date. The maximum rentals fixed for housing accommodations rented on April 1, 1941 were the rents obtained on that date. § 1388.1704(a). As respects housing accommodations not rented on April 1, 1941, but rented for the first time between that date and the effective date of the regulation, July 1, 1942—the situation involved in this case—it was provided that the maximum rent should be the first rent charged after April 1, 1941. § 1388.1704(c). But in that case it was provided that the Rent Director (designated by § 1388.1713) might order a decrease on his own initiative on the ground, among others, that the rent was higher than that generally prevailing in the area for comparable housing accommodations on April 1, 1941. § 1388.1704(c), § 1388.1705(c)(1). By Procedural Regulation No. 3, as amended (8 Fed. Reg. 526, 1798, 3534, 5481, 14811) issued pursuant to § 201(d) and § 203(a) of the Act[4] provision was made that when the Rent Director proposed to take such action he should serve a notice upon the landlord involved, stating the proposed action and the grounds therefor. § 1300.207. Within 60 days of the final action of the Rent Director the land-

---

And § 2(c) provides: "Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

[3] See the provisions of § 2(b) in note 2, *supra*.

[4] Sec. 201(d) provides: "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Sec. 203(a) provides in part: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price

lord might file an application for review by the regional administrator for the region in which the defense-rental area office was located and then file a protest with the Administrator for review of the action of the regional office (§ 1300.209, § 1300.210); or he might proceed by protest immediately. § 1300.209, § 1300.215. As we develop more fully hereafter, the Act provides in § 203(a) for the filing of protests with the Administrator. The machinery for a hearing on a protest and a determination of the issue by the Administrator (§ 1300.215-§ 1300.240) was designed to provide the basis of judicial review by the Emergency Court of Appeals as authorized by § 204(a) of the Act.

In June, 1943, the Rent Director gave written notice to Mrs. Willingham that he proposed to decrease the maximum rents for three apartments owned by her, and which had not been rented on April 1, 1941, but were first rented in the summer of 1941, on the ground that the first rents for these apartments received after April 1, 1941, were in excess of those generally prevailing in the area for comparable accommodations on April 1, 1941. Mrs. Willingham filed objections to that proposed action together with supporting affidavits. The Rent Director thereupon advised her that he would proceed to issue an order reducing the rents. Before that was done she filed her bill in the Georgia court. The present suit followed shortly, as we have said.

I. We are met at the outset with the question whether the District Court could in any event give the relief which the Administrator seeks in view of § 265 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 379) which provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118. In that case we listed

schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator."

the few Acts of Congress passed since its first enactment in 1793 which operate as implied legislative amendments to it. 314 U. S. pp. 132-134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942. By § 205(a), the Administrator is given authority to seek injunctive relief in the appropriate court (including the federal district courts) against acts or practices in violation of § 4, e. g., the receipt of rent in violation of any regulation or order under § 2. Moreover, by § 204(d) of the Act one who seeks to restrain or set aside any order of the Administrator or any provision of the Act is confined to the judicial review granted to the Emergency Court of Appeals, which was created by § 204(c) and to this Court.[5] As we recently held in *Lockerty* v. *Phillips*, 319 U. S. 182, 186, 187, Congress confined jurisdiction to grant equitable relief to that narrow channel and withheld such jurisdiction from every other federal and state court. Congress thus preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts.[6] The rule expressed in § 265 which is designed to avoid collisions between state and federal authorities (*Toucey* v. *New York Life Ins. Co., supra*) thus does not come into play. The powers of the District Court under § 205(a) of the Act and § 24(1) of the Judicial Code are ample authority for that court to protect the exclusive federal jurisdiction which Congress created.

The suggestion is made that Congress could not constitutionally withhold from the courts of the States jurisdiction to entertain

[5] Sec. 204(d) provides in part: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

It should also be noted that § 204(c) withholds from the Emergency Court power "to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206."

[6] It is true that § 205(c) gives to state and territorial courts concurrent jurisdiction of all proceedings (except criminal proceedings) under § 205 of the Act. But they embrace only enforcement suits brought by the Administrator, not suits brought to restrain or enjoin enforcement of the Act or orders or regulations thereunder.

suits attacking the Act on constitutional grounds. But we have here a controversy which arises under the Constitution and laws of the United States and is therefore within the judicial power of the United States as defined in Art. III, § 2 of the Constitution. Hence Congress could determine whether the federal courts which it established should have exclusive jurisdiction of such cases or whether they should exercise that jurisdiction concurrently with the courts of the States. *Plaquemines Fruit Co.* v. *Henderson*, 170 U. S. 511, 517; *The Moses Taylor*, 4 Wall. 411, 428-430. And see *Tennessee* v. *Davis*, 100 U. S. 257; *McKay* v. *Kalyton*, 204 U. S. 458, 468-469. Under the present Act all jurisdiction has not been withheld from state courts, since they have concurrent jurisdiction over all civil enforcement suits brought by the Administrator. § 205(c). But the authority of Congress to withhold all jurisdiction from the state courts obviously includes the power to restrict the occasions when that jurisdiction may be invoked.

II. The question of the constitutionality of the rent control provisions of the Act[7] raises issues related to those considered in *Yakus* v. *United States*, No. 374, and *Rottenberg* v. *United States*, No. 375, decided this day.

When it came to rents Congress pursued the policy it adopted respecting commodity prices. It established standards for administrative action and left with the Administrator the decision when the rent controls of the Act should be invoked. He is empowered to fix maximum rents for housing accommodations in any defense-rental area,[8] whenever in his judgment that action is necessary or proper in order to effectuate the purposes of the Act. A defense-rental area is any area "designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes" of the Act. § 302(d). The controls adopted by Congress were thought necessary "in the interest of the national defense and security" and for the "effective prosecution of the present war." Sec. 1(a). They have as their aim the effective protection of our price structures against the forces of disorganization and the pressures created by war and its at-

[7] Here as in Yakus v. United States, *supra*, the Administrator concedes that in an enforcement suit the constitutionality of the Act as distinguished from the constitutionality of orders or regulations under the Act is open. As pointed out in the *Yakus* case, reliance is placed on § 204(d), *supra* note 5. And see S. Rep. No. 931, 77th Cong., 2d Sess., pp. 24-25.

[8] The terms rent, defense-rental area, defense-area housing accommodations, and housing accommodations are defined in § 302 of the Act.

tendant activities.[9] § 1(a); S. Rep. No. 931, 77th Cong., 2d Sess., pp. 1-5. Thus the policy of the Act is clear. The maximum rents fixed by the Administrator are those which "in his judgment" will be "generally fair and equitable and will effectuate the purposes of this Act." § 2(b). But Congress did not leave the Administrator with that general standard; it supplied criteria for its application by stating that so far as practicable the Administrator in establishing any maximum rent should ascertain and give consideration to the rents prevailing for the accommodations, or comparable ones, on April 1, 1941. The Administrator, however, may choose an earlier or later date if defense activities have caused increased rents prior or subsequent to April 1, 1941. But in no event may the Administrator select a date earlier than April 1, 1940. And in determining a maximum rent "he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs." § 2(b). And Congress has provided that the Administrator "may provide for such adjustments and reasonable exceptions" as in his judgment are "necessary or proper in order to effectuate the purposes of this Act." § 2(c).

The considerations which support the delegation of authority under this Act over commodity prices (*Yakus* v. *United States*) are equally applicable here. The power to legislate which the Constitution says "shall be vested" in Congress (Art. I. § 1) has not been granted to the Administrator. Congress in § 1(a) of the Act has made clear its policy of waging war on inflation. In § 2(b) it has defined the circumstances when its announced policy

[9] Sec. 1(a) provides in part: "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense. *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126, 144.

There is no grant of unbridled administrative discretion as appellee argues. Congress has not told the Administrator to fix rents whenever and wherever he might like and at whatever levels he pleases. Congress has directed that maximum rents be fixed in those areas where defense activities have resulted or threaten to result in increased rentals inconsistent with the purpose of the Act. And it has supplied the standard and the base period to guide the Administrator in determining what the maximum rentals should be in a given area. The criteria to guide the Administrator are certainly not more vague than the standards governing the determination by the Secretary of Agriculture in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 576-577, of marketing areas and minimum prices for milk. The question of how far Congress should go in filling in the details of the standards which its administrative agency is to apply raises large issues of policy. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398. We recently stated in connection with this problem of delegation, "The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable." *Opp Cotton Mills, Inc.* v. *Administrator*, *supra*, p. 145. In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward. Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our concern. Our inquiry ends with the constitutional issue. Congress here has specified the basic conclusions of fact upon the ascertainment of which by the Administrator its statutory command is to become effective. But that is not all. The Administrator on the denial of protests must inform the protestant of the "grounds upon which" the decision is based and of any "economic data and other facts of which the Administrator has taken official notice". § 203(a). These materials

and the grounds for decision which they furnished are included in the transcript on which judicial review is based. § 204(a). We fail to see how more could be required (*Taylor* v. *Brown*, 137 F. 2d 654, 658-659) unless we were to say that Congress rather than the Administrator should determine the exact rentals which Mrs. Willingham might exact.

As we have pointed out and as more fully developed in *Yakus* v. *United States*, *supra*, § 203(a) of the Act provides for the filing of a protest with the Administrator against any regulation or order under § 2. Moreover, any person "aggrieved" may secure judicial review of the action of the Administrator in the Emergency Court of Appeals. § 204(a). And that review is on a transcript which includes "a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice." § 204(a). Here, as in the *Yakus* case, the standards prescribed by the Act are adequate for the judicial review which has been accorded. The fact that there is a zone for the exercise of discretion by the Administrator is no more fatal here than in other situations where Congress has prescribed the general standard and has left to an administrative agency the determination of the precise situations to which the provisions of the Act will be applied and the weight to be accorded various statutory criteria on given facts. *Opp Cotton Mills, Inc.* v. *Administrator*, *supra*; *Yakus* v. *United States*, *supra*.

Thus so far as delegation of authority is concerned, the rent control provisions of the Act, like the price control provisions (*Yakus* v. *United States*, *supra*), meet the requirements which this Court has previously held to be adequate for peace-time legislation.

III. It is said, however, that § 2(b) of the Act is unconstitutional because it requires the Administrator to fix maximum rents which are "generally fair and equitable". The argument is that a rental which is "generally fair and equitable" may be most unfair and inequitable as applied to a particular landlord and that a statute which does not provide for a fair rental to each landlord is unconstitutional. During the first World War the statute for the control of rents in the District of Columbia provided machinery for securing to a landlord a reasonable rental. *Block* v. *Hirsh*, 256 U. S. 135, 157. And see *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242. And under other price-fixing statutes such as the Natural Gas Act of 1938 (52 Stat. 821, 15 U. S. C. § 717) Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons or companies. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591. Con-

gress departed from that pattern when it came to the present Act. It has been pointed out that any attempt to fix rents, landlord by by landlord, as in the fashion of utility rates, would have been quite impossible. *Wilson* v. *Brown*, 137 F. 2d 348, 352-354. Such considerations of feasibility and practicality are certainly germane to the constitutional issue. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 299; *Opp Cotton Mills, Inc.* v. *Administrator, supra*, p. 145. Moreover, there would be no constitutional objection if Congress as a war emergency measure had itself fixed the maximum rents in these areas. We are not dealing here with a situation which involves a "taking" of property. *Wilson* v. *Brown, supra*. By § 4(d) of the Act it is provided that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." There is no requirement that the apartments in question be used for purposes which bring them under the Act. Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But, as we have pointed out in the *Hope Natural Gas Co.* case (320 U. S. p. 601), that does not mean that the regulation is unconstitutional. Mr. Justice Holmes, speaking for the Court, stated in *Block* v. *Hirsh, supra*, p. 155: "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power. *L'Hote* v. *New Orleans*, 177 U. S. 587, 598; *Welch* v. *Swasey*, 214 U. S. 91; *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 157; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. And the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. *Hamilton* v. *Kentucky Distilleries Co., supra*; *United States* v. *Darby*, 312 U. S. 100.

It is implicit in cases such as *Nebbia* v. *New York*, 291 U. S. 502, which involved the power of New York to fix the minimum and maximum prices of milk, and *Sunshine Anthracite Coal Co.* v. *Adkins, supra*, which involved the power of the Bituminous Coal Commission to fix minimum and maximum prices of bituminous coal, that high cost operators may be more seriously affected by price control than others. But it has never been thought that price-fixing, otherwise valid, was improper because it was on a class rather than an individual basis. Indeed, the decision in *Munn* v. *Illinois*, 94 U. S. 113, the pioneer case in this Court, involved a legislative schedule of maximum prices for a defined class of warehouses and was sustained on that basis. We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort. *Yakus* v. *United States, supra*. A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.

IV. It is finally suggested that the Act violates the Fifth Amendment because it makes no provision for a hearing to landlords before the order or regulation fixing rents becomes effective. Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia. See 55 Stat. 788. We agree with the Emergency Court of Appeals (*Avant* v. *Bowles*, 139 F. 2d 702) that Congress need not make that requirement when it delegates the task to an administrative agency. In *Bi-Metallic Investment Co.* v. *State Board*, 239 U. S. 441, a suit was brought by a taxpayer and landowner to enjoin a Colorado Board from putting in effect an order which increased the valuation of all taxable property in Denver 40 per cent. Such action, it was alleged, violated the Fourteenth Amendment as the plaintiff was given no opportunity to be heard. Mr. Justice Holmes, speaking for the Court, stated, p. 445: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights

are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." We need not go so far in the present case. Here Congress has provided for judicial review of the Administrator's action. To be sure, that review comes after the order has been promulgated; and no provision for a stay is made. But as we have held in *Yakus* v. *United States, supra,* that review satisfies the requirements of due process. As stated by Mr. Justice Brandeis for a unanimous Court in *Phillips* v. *Commissioner,* 283 U. S. 589, 596-597: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer* v. *United States,* 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Bowland,* 196 U. S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

Language in the cases that due process requires a hearing before the administrative order becomes effective (*Morgan* v. *United States,* 304 U. S. 1, 19-20; *Opp Cotton Mills, Inc.* v. *Administrator, supra,* pp. 152-153) is to be explained on two grounds. In the first place the statutes there involved required that procedure.

Secondly, as we have held in *Yakus* v. *United States, supra,* Congress was dealing here with the exigencies of war time conditions and the insistent demands of inflation control. Cf. *Porter* v. *Investors Syndicate,* 286 U. S. 461, 471. Congress chose not to fix rents in specified areas or on a national scale by legislative fiat. It chose a method designed to meet the needs for rent control as they might arise and to accord some leeway for adjustment within the formula which it prescribed. At the same time the procedure which Congress adopted was selected with the view of eliminating the necessity for "lengthy and costly trials with concomitant dissipation of the time and energies of all concerned in litigation rather than in the common war effort." S. Rep. No. 931, 77th Cong., 2d Sess., p. 7. To require hearings for thousands of landlords before any rent control order could be made effective might have defeated the program of price control. Or Congress might well have thought so. National security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed.

We fully recognize, as did the Court in *Home Bldg. & Loan Assoc.* v. *Blaisdell*, 290 U. S. 398, 426, that "even the war power does not remove constitutional limitations safeguarding essential liberties." And see *Hamilton* v. *Kentucky Distilleries Co.*, *supra*, p. 155. But where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires.

Other objections are raised concerning the regulations or orders fixing the rents. But these may be considered only by the Emergency Court of Appeals on the review provided by § 204. *Yakus* v. *United States*, *supra*.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 464.—October Term, 1943.

Chester Bowles, as Administrator of the Office of Price Administration, Appellant, vs. Mrs. Kate C. Willingham and J. R. Hicks, Jr.	Appeal from the District Court of the United States for the Middle District of Georgia.

[March 27, 1944.]

Mr. Justice Rutledge, concurring.

I concur in the result and substantially in the Court's opinion, except for qualifications expressed below. In view of these and my difference from the Court's position in *Yakus* v. *United States*, No. 374, and *Rottenberg* v. *United States*, No. 375, decided this day, a statement of reasons for concurrence here is appropriate.

I.

With reference to the substantive aspects of the legislation, I would add here only the following. Since the phases in issue in this case relate to real estate rentals, it is not amiss to note that these ordinarily are within the state's power to regulate rather than that of the federal government. But their relation, both to the general system of controlling wartime price inflation and to the special problems of housing created in particular areas by war activities, gives adequate ground for exercise of federal power over them.

Likewise, with respect to the delegation of authority to the administrator to designate "defense rental areas" and to fix maximum rentals within them, the same considerations, and others, sustain the delegation as do that to fix prices of commodities generally. The power to specify defense rental areas, rather than amounting to an excess of permissible delegation, is actually a limitation upon the administrator's authority, restricting it to regions where the facts, not merely his judgment, make control of

rents necessary both to keep down inflation and to carry on the war activities concentrated in them. Accordingly, I concur fully with the Court's expressed views concerning the substantive features of the legislation.

II.

This appeal presents two kinds of jurisdictional and procedural questions, though they are not unrelated. The first sort relate to the power of the District Court to restrain the further prosecution of the state court proceedings and the execution of, or attempts to execute, orders issued in them. The other issues relate to the District Court's power to restrain Mrs. Willingham from violating the Emergency Price Control Act and the orders issued pursuant to it affecting her interests.

As to the former, I have no doubt that the District Court had power, for the reasons stated by the Court, to restrain the prosecution of the suit in the state court and the execution of orders made by it. By Section 204(d) of the Act, Congress withheld from all courts, including the state courts, with an exception in the case of the Emergency Court of Appeals and this Court on review of its judgments, "jurisdiction . . . to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision." The single exception was the power of the Emergency Court by its final judgment, or of this Court on final disposition in review thereof, Section 204(a), (b), to set aside an order or regulation. Congress clearly had the power thus to confine the equity jurisdiction of the federal courts and to make its mandate for uninterrupted operation of the rent control system effective by prohibiting the state courts so to interfere with the statutory plan, at least until it should be shown invalid by the channel created for this purpose.[1] Any effort of the state court therefore to enjoin the issuance of rent orders or suspend their operation, whether on constitutional or other grounds, was directly in the teeth of the statute's explicit provisions and a violation of its terms. By this mandate the state courts were not

[1] The Moses Taylor, 4 Wall. 411; cf. Claflin v. Houseman, Assignee, 93 U. S. 130, Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 511.

required to give their sanction to enforcement of an unconstitutional act or regulation or even of one which might turn out to be such. They were merely commanded to keep hands off and leave decision upon the validity of the statute or the regulations, for purposes of suspending or setting them aside, to another forum established for that purpose. Congress clearly had the power and the intent to authorize federal courts to enforce this command, by injunction if necessary.

III.

In vesting jurisdiction in the federal district courts to enjoin violations of the Price Control Act and regulations issued pursuant to it, Congress included not only violations of the statute's prohibition directed to the state courts against staying enforcement but other violations as well. The District Court, acting in the exercise of that jurisdiction, rested its judgment on the decision of a question it was authorized to consider, namely, whether the Act, rather than merely a regulation issued under it, is invalid. Since the court decided that question erroneously in disposing of this case, reversal of its judgment would be required. And perhaps in strictness this is all that it would be necessary to decide at this time.

But the contention has been made earnestly all through these proceedings that the regulations, on the basis of which any injunction obtained by the administrator must rest, are invalid and beyond his authority under the Act. And the Court, relying upon the decision in the *Yakus* and *Rottenberg* cases, has indicated that these contentions may not be considered in a proceeding of this character.

From what already has been said, it is clear the contention misconceives the administrator's rights with respect to an injunction restraining the further prosecution of the state suit and execution of the state court's orders. His right to such an injunction may rest on considerations entirely different from those governing his right to secure an injunction restraining Mrs. Willingham from violating the regulation. The former could be founded wholly upon the power of Congress to require the state courts to keep hands entirely off, in the discharge of federal functions by federal officials, at any rate during such time as might be required for

decision, with finality, upon the validity of the statute and regulations issued under it by an appropriate alternative federal method. The latter, however, presents the different question whether Congress can require the federal district courts, organized under Article III and vested by it with the judicial power, not merely to keep hands off, but by affirmative exercise of their powers to give permanent sanction to the legislative or administrative command, notwithstanding it is or may be in conflict with some constitutional mandate.

That Congress can require the court exercising the civil jurisdiction in equity to refrain from staying statutory provisions and regulations is clear. Whether the enforcing court acts civilly or criminally, in circumstances like these, Congress can cut off its power to stay or suspend the operation of the statute or the regulation pending final decision that it is invalid. But this leaves the question whether Congress also can confer the equity jurisdiction to decree enforcement and at the same time deprive the court of power to consider the validity of the law or regulation and to govern its decree accordingly.

Different considerations, in part, determine this question from those controlling when enforcement is by criminal sanction. The constitutional limitations specially applicable to criminal trials fall to one side. Those relating to due process of law in civil proceedings, including whatever matters affecting discrimination are applicable under the Fifth Amendment, and to the independence of the judicial power under Article III, in relation to civil proceedings, remain applicable. Since in these cases the rights involved are rights of property, not of personal liberty or life as in criminal proceedings, the consequences, though serious, are not of the same moment under our system, as appears from the fact they are not secured by the same procedural protections in trial. It is in this respect perhaps that our basic law, following the common law, most clearly places the rights to life and to liberty above those of property.

All this is pertinent to whether Congress, in providing for civil enforcement of the Act and the regulations, can do what in my opinion it cannot require by way of criminal enforcement of this statute, namely, by providing the single opportunity to challenge the validity of the regulation and making this available for the limited time, constitute the method afforded the exclusive mode

for securing decision of that question and, either by virtue of the taking advantage of it or by virtue of the failure to do so within the time allowed, foreclose further opportunity for considering it.

In my opinion Congress can do this, subject however to the following limitations or reservations, which I think should be stated explicitly: (1) The order or regulation must not be invalid on its face; (2) the previous opportunity must be adequate for the purpose prescribed, in the constitutional sense; and (3), what is a corollary of the second limitation or implicit in it, the circumstances and nature of the substantive problem dealt with by the legislation must be such that they justify both the creation of the special remedy and the requirement that it be followed to the exclusion of others normally available.

In this case, in my judgment, these conditions concur to justify the procedure Congress has specified. Except for the charge that the regulations, or some of them, are so vague and indefinite as to be incapable of enforcement, there is nothing to suggest they are invalid on their face. And they clearly are not so, either in the respect specified or otherwise.[2] The proceeding by protest and appeal through the Emergency Court, even for civil consequences only, approaches the limit of adequacy in the constitutional sense, both by reason of its summary character[3] and because of the shortness of the period allowed for following it.[4] A reservation perhaps

---

[2] The maximum rentals established in the regulation are definite and easily enough ascertainable. Appellee's complaint against the regulation on the score of vagueness is addressed to the indefiniteness of the standards which the administrator has prescribed as a guide for his office in making decreases in maximum rentals, more particularly to Section 5(c)(1), which authorizes a decrease in the maximum if it is "higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941." But assuming this complaint is otherwise meritorious, the standards thus provided are no less definite than those contained in the Act itself and the contention is therefore disposed of by the determination of the constitutionality of the Act.

[3] Cf. the writer's dissenting opinion in Yakus v. United States, No. 374, decided this day.

[4] Under the Act a protest against a regulation must be made within sixty days of its issuance, but if based on grounds arising after the sixty days, it may be filed "at any time" thereafter.

But under the Administrator's Revised Procedural Regulation No. 3, § 1300.216, "a protest against a provision of a maximum rent regulation based solely on grounds arising after the date of issuance of such maximum rent regulation shall be filed within a period of sixty days after the protestant has had, or could reasonably have had, notice of the existence of such grounds."

is in order in the latter respect, when facts are discovered after the period which, if proven, would invalidate the regulation and which by reasonable diligence could not have been discovered before the period ends. Finally, it hardly can be disputed that the substantive problem and the circumstances which created and surrounded it were such as, if ever they could be, to justify a procedure of this sort.[5]

Accordingly, I agree that, as against the challenges made here, the special remedy provided by the Act was adequate and appropriate, in the constitutional sense, for the determination of appellee's rights with civil effects, had she followed it. And her failure to follow it produced no such irrevocable and harmful consequences, for such purposes, as would ensue if she were charged with violation as a crime. Accordingly, by declining to take the plain way opened to her, more inconvenient though that may have been, and taking her misconceived remedy by another route, she has arrived where she might well have expected, at the wrong end.

No doubt this was due to a misconception of her rights, both as a matter of substance and as one of procedure, due perhaps to failure to take full account of the reach of the nation's power in war. Nevertheless, the Court not improperly has set at rest some of her misconceptions concerning the effects of the regulations. Thus, it is held that the statute is not invalid in providing for maximum rents which are "generally fair and equitable." Section 2(b). It does not lessen the effect of this ruling for purposes of deciding the regulation's validity, that Maximum Rent Regulation Number 26, Section 5(c)(1), of which appellee complained on various constitutional grounds, including confiscation, provided that the administrator might order a decrease of the maximum rent for specified housing accommodations only on the ground that that rent "is higher than the rent *generally prevailing in the defense rental area* for comparable housing accommodations on April 1, 1941." (Italics added.)

Other issues raised by the appellee with respect to the regulations likewise are disposed of by the rulings upon the statute's provisions.[6] In so far as the regulations are identical with the

[5] Cf. The writer's dissenting opinion in Yakus v. United States, No. 374, decided this day.

[6] E. g. the contention that the regulation, like the Act, improperly delegates to the administrator and his agents "legislative" power.

statute, therefore, and the objections to them are identical, the disposition of these objections to the Act disposes also of those made to the regulations. In so far as the latter raised questions not raised concerning the statute, and since none of these, except as mentioned above, called attention to any feature making a regulation void on its face, the appellee has foreclosed her opportunity to assert them, as to facts existing when the suit was begun, by her failure to follow the prescribed special remedy. It is not unreasonable, in a matter of this importance and urgency, to require one, whose only valid objection to the law, including the regulations, rests in proof of facts not apparent to the administrator or the court, to make his proof in the manner provided and to do so promptly, as a condition to securing equitable or other civil relief.

SUPREME COURT OF THE UNITED STATES.

No. 464.—October Term, 1943.

Chester Bowles, as Administrator of the Office of Price Administration, Appellant, *vs.* Mrs. Kate C. Willingham and J. R. Hicks, Jr.	Appeal from the District Court of the United States for the Middle District of Georgia.

[March 27, 1944.]

Mr. Justice Roberts.

I should be content if reversal of the District Court's decision were upon the ground that that court lacked power to enjoin prosecution of the appellees' state court suit. The policy expressed in § 265 of the Judicial Code applies in this instance. Moreover, if the provision of § 204(d) of the Emergency Price Control Act is valid, the lack of jurisdiction of the state court could, and should, have been raised in that court and review of its ruling could have been obtained by established means of resort to this court. Since, however, the court has determined that the District Court acted within its competency in enjoining further prosecution of the state court suit, other issues must be faced.

The appellant in his complaint charged that the appellees threatened to disobey the provisions of the Act and the regulations made pursuant to it. The appellees answered that the Act and the regulations were void because in excess of the powers of Congress. I do not understand the Administrator to contend that the court below was precluded by the terms of the statute from passing upon the question whether the Act constitutes an unconstitutional delegation of legislative power. I am not sure whether he asserts that the provisions of § 204(d), which purport to prohibit any court, except the Emergency Court of Appeals created by the Act, from considering the validity of any regulation or order made under the Act, prevent consideration of the Administrator's rent regulations and orders here under attack. If so, I think the contention is untenable.

The statute of its own force is not applicable in any area except the District of Columbia unless and until so made by a regulation of the Administrator. The statutory provisions respecting rentals amount only to conference of authority on the Administrator to make regulations and do not themselves prescribe or constrain any conduct on the part of the citizen. In short, one cannot violate the provisions of the statute unless they are implemented by administrative regulations or orders. To say then that, while the court in which the Administrator seeks enforcement of the Act, and regulations made under it, has jurisdiction to pass upon the constitutionality of the Act, it may not consider the validity of pertinent regulations, is to say that the court is to consider the Act *in vacuo* and wholly apart from its application to the defendant against whom enforcement is sought. Under the uninterrupted current of authority the argument must be rejected.

This brings me to a consideration of the appellees' principal contention, namely, that, as applied to rent control, the Emergency Price Control Act is an unconstitutional delegation of legislative power to an administrative officer. In approaching this question it is hardly necessary to state the controlling principles which have been reiterated in recent decisions.[1] Congress may perform its legislative function by laying down policies and establishing standards while leaving administrative officials free to make rules within the prescribed limits and to ascertain facts to which the declared policy is to apply. But any delegation which goes beyond the application and execution of the law as declared by Congress is invalid.

Congress cannot delegate the power to make a law or refrain from making it; to determine to whom the law shall be applicable and to whom not; to determine what the law shall command and what not. Candid appraisal of the rent control provisions of the Act in question discloses that Congress has delegated the law making power *in toto* to an administrative officer.

As already stated, the Act is not in itself effective with respect to rents. It creates an Office of Price Administration to be under the direction of a Price Administrator appointed by the President (50 U. S. C. § 921(a)). This official is authorized "whenever in [his] judgment . . . such action is necessary or proper

[1] Panama Refining Co. *v.* Ryan, 293 U. S. 388; A. L. A. Schechter Poultry Corp. *v.* United States, 295 U. S. 495.

in order to effectuate the purposes" of the Act to issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for accommodations within a particular defense-rental area. If, within sixty days such rents within such area have not "in the judgment of the Administrator" been stabilized or reduced in accordance with his recommendations he may, by regulation or order, establish such maximum rent or maximum rents for such accommodations "as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act. "So far as practicable" in establishing maximum rents he is to ascertain and duly consider the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted, or threaten to result, in increases in rents of housing accommodations in such area inconsistent with the purposes of the Act, then on or about a date (not earlier than April 1, 1940) which, "in the judgment of the Administrator" does not reflect such increases); and he shall make adjustments "for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs." "In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable," consider recommendations made by State and local officials (50 U. S. C. § 902(b)). The form and the manner of establishing a regulation or order, the insertion of classifications and differentiations, the provisions for adjustments and reasonable exceptions lie wholly "in the judgment of the Administrator" as to their necessity or propriety in order to effectuate the purposes of the Act (50 U. S. C. § 902(c)).

The "judgment of the Administrator" as to what is necessary and proper to effectuate the purposes of the Act is the only condition precedent for his issue of an order, regulation, or prohibition, affecting speculative or manipulative practices or renting or leasing practices in connection with any defense-area housing accommodations, which practices "in his judgment" are equiva-

lent to or are likely to result in rent increases inconsistent with the purposes of the Act (50 U. S. C. § 902(d)).

At the moment these statutory provisions were adopted rent control was not effective in any part of the nation. The Administrator was appointed for the purpose of enacting such control by regulations and orders. As will be seen, the first step he was authorized to take was to issue a declaration stating the necessity for reduction of rents within a particular defense-rental area and recommendations as to the nature of such reductions.

How is the reader of the statute to know what is meant by the term "defense-rental area"? The statutory "standard" is this:

"The term 'defense-rental area' means the District of Columbia and any area designated by the Administrator as an area where *defense activities* have resulted or *threaten* to result in an increase in the rents for housing accommodations *inconsistent with the purposes of this Act.*" (Italics supplied.) (50 U. S. C. § 942(d)).

Save for the District of Columbia, the designation of an area where the Act is to operate depends wholly upon the Administrator's judgment that so-called defense activities have resulted or threaten to result in an increase of rents inconsistent with the purposes of the Act. Note that the judgment involved is solely that of the Administrator. He need find no facts, he need make no inquiry, he need not, unless he thinks it practicable, even consult local authorities. In exercising his judgment the Administrator must be persuaded that "defense activities" have caused or will cause a rise in rents. The statute nowhere defines or gives a hint as to what defense activities are. In time of war it is conceivable that an honest official might consider any type of work a defense activity. His judgment, however exorbitant, determines the coverage of the Act. It is true that he is authorized to make such studies and investigations as he deems necessary or proper to assist him in prescribing regulations or orders (50 U. S. C. § 922(a)), but his unfettered judgment is conclusive whether any are necessary or proper.

But is not the Administrator's judgment channeled and confined by the final limitation that his action must be the promotion of the "purposes of this Act"? What are they? So far as material they are: "To prevent speculative, unwarranted, and abnormal increases in . . . rents" (50 U. S. C. § 901(a)). There

are other general phrases in the section which may be claimed to throw some light on the considerations the Administrator may entertain but, so far as rents are concerned, they are so vague as to be useless; as, for example, the protection of persons with relatively fixed and limited incomes, consumers, wage earners, investors and persons dependent on life insurance, annuities, and pensions from undue impairment of their standard of living, and more of the same. I have discussed these "standards" in an opinion filed in *Yakus* v. *United States*, No. 374.

Language could not more aptly fit this grant of power than that used in *Schechter* v. *United States, supra*, at p. 551: "Here in effect is a roving commission to inquire into evils and upon discovery correct them." Equally apposite is what was said at p. 541: "It [the Act] does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."

Placing the relevant sections of the statute together we find that the term "defense-rental area" means any area designated by the Administrator as an area where "defense activities" have resulted, or threaten to result, in "speculative, unwarranted, and abnormal increases in . . . rents". Can anyone assert that Congress has thus laid down a standard to control the action of the executive? The Administrator, and he alone, is to say what increase is speculative, what increase is unwarranted, and what increase is abnormal. What facts is he to consider? Such as he chooses. What facts did he consider in the instant case? One cannot know.

But the matter does not stop here. We have now only arrived at the designation of an area by the Administrator. As we have seen, his next step is to issue a declaration or recommendation. How shall he determine whether to do so or not? As seen by the

above summary of the Act's provisions, the matter rests in the judgment of the Administrator as to whether such action is necessary or proper to effectuate the purposes of the Act. We have just seen what those purposes are. Again his sole and untrammeled judgment as to what is needed to prevent speculative, unwarranted or abnormal increases is the only criterion of his action. The public records show that declarations made by him merely state that, in his judgment, the basic fact exists. He makes no findings; he is not bound to make any specific inquiry; he issues a fiat. No one is to be advised as to the basis of his judgment; no one need be heard.

Does the statute afford a standard for the Administrator to follow in deciding the quantity of the reduction? Again his judgment alone is determinative. And, more, in his judgment alone rests the decision as to what accommodations within the area are to be affected by the decreed reduction. He may recommend the reduction of rent for "any accommodations" within the defense-rental area.

After the issue of his declaration and recommendations the Administrator must wait sixty days before putting his recommendations into effect. If, in his sole and unfettered judgment, stabilization has not been accomplished, he may then, by regulation or order, establish such maximum rent or maximum rents as "in his judgment" will be "generally fair and equitable and will effectuate the purposes of this Act." His order may be based upon nothing but his own opinion. It may be made without notice, without hearing, without inquiry of any sort, without consultation with local authorities. The rents established may vary from street to street, and from subdivision to subdivision, all in accordance with the Administrator's personal judgment. The order may involve classification and exemption if the Administrator, in his sole discretion, deems that this course will "effectuate the purposes of this Act". Which means, of course, if he thinks non-speculation, non-abnormality, or sufficient warrant justifies the discriminations involved.

How shall he fix the amount of the maximum rent? The only standard given him is the exercise of his own judgment that the rents fixed will be "generally fair and equitable and will effectuate the purposes of this Act." "Fair and equitable" might conceiv-

ably be a workable standard if inquiry into the specific facts were prescribed and if the bearing of those facts were to be given weight in the ultimate decision, but the addition of the word "generally", and the failure to prescribe any method for arriving at what is fair and equitable leaves the Administrator such room for disregard of specific injustices and particular circumstances that no living person could demonstrate error in his conclusion. And, again, even the phrase "generally fair and equitable" is qualified by empowering the Administrator to consider also questions of speculation, unwarranted action or abnormality of condition. Such a "standard" is pretense. It is a device to allow the Administrator to do anything he sees fit without accountability to anyone.

But, it is said, this is an unfair characterization of the statute because, "so far as practicable", the Administrator must ascertain and duly consider rents prevailing for "such accommodations, or comparable accommodations, on or about April 1, 1941", and that, although he may pick out some other period which he thinks more representative, he must not select any period earlier than April 1, 1940, and, therefore, he is definitely confined and prohibited in exercising control over rentals. This argument will not do. The mere fact that he may not go to any period for comparison earlier than April 1, 1940, although he may take any later period he thinks appropriate, does not serve to obliterate the fact that after such wide and unrestricted choice of a period he can make any regulation he sees fit.

Without further elaboration it is plain that this Act creates personal government by a petty tyrant instead of government by law. Whether there shall be a law prescribing maximum rents anywhere in the United States depends solely on the Administrator's personal judgment. When that law shall take effect, how long it shall remain in force, whether it shall be modified, what territory it shall cover, whether different areas shall be subject to different regulations, what is the nature of the activity that shall motivate the institution of the law,—all these matters are buried in the bosom of the Administrator and nowhere else.

I am far from urging that, in the present war emergency, rents and prices shall not be controlled and stabilized. But I do insist that, war or no war, there exists no necessity, and no constitu-

tional power, for Congress' abdication of its legislative power and remission to an executive official of the function of making and repealing laws applicable to the citizens of the United States. No truer word was ever said than this court's statement in the *Minnesota Mortgage Moratorium Case*[2] that emergency does not create power but may furnish the occasion for its exercise. The Constitution no more contemplates the elimination of any of the coordinate branches of the Government during war than in peace. It will not do to say that no other method could have been adopted consonant with the legislative power of Congress. "Defense-rental areas" and "defense activities" could have been reasonably defined. Rents in those areas could have been frozen as of a given date, or reasonably precise standards could have been fixed, and administrative or other tribunals could have been given power according to the rules and standards prescribed to deal with special situations after hearing and findings and exposition of the reasons for action. I say this only because the argument has been made that the emergency was such that no other form of legislation would have served the end in view. It is not for this court to tell Congress what sort of legislation it shall adopt but, in this instance, when Congress seems to have abdicated and to have eliminated the legislative process from our constitutional form of Government, it must be stated that this cannot be done unless the people so command or permit by amending the fundamental law.

The obvious answer to what I have said is that this court has sustained, and no one would now question, the constitutional validity of Acts of Congress laying down purported standards as vague as those contained in the Act under consideration. But the answer is specious. Generally speaking, statutes invoking the aid of the administrative arm of the Government for their application and enforcement fall into two classes,—those in which a policy is declared and an administrative body is empowered to ascertain the facts in particular cases so as to determine whether that policy in a particular case had been violated. Of this type of legislation the Interstate Commerce Act and the Federal Trade Commission Act are classical examples. In the one, carriers are required to charge just and reasonable rates for their services. In the other citizens are forbidden to indulge in unfair methods

[2] Home Building & Loan Assn. v. Blaisdell, 290 U. S. 398, 425, 426.

of competition. If it be asserted that these are but vague standards of conduct it must at once be said that, in adopting them, Congress adopted common law concepts, the one applying to those pursuing a public calling and the other to business competitors in general, and that the standards announced carried with them concepts and contours attaching as a result of a long legal history. But more, in such instances, the standards were not to be applied in the uncontrolled judgment of the administrative body. On the contrary, the statutes require a complaint specifying the conduct thought to violate the statute and opportunity for answer, for hearing, for production of evidence, and for findings which are subject to judicial review. With such a background for administrative procedure what seems a loose and vague standard becomes in fact a reasonably ascertainable one that can fairly, equitably, and justly be applied.

The other and distinct class of cases is that in which Congress, as in the present instance, declares a policy and entrusts to an administrative agent, without more, the making of general rules and regulations for the implementation of that policy. These rules are, in all but name, statutes. Here, unless the rule for the guidance of the Administrator is clear, and the considerations upon which he may act are definite and certain, it must inevitably follow that, to a greater or less degree, he will make the law. No citizen can question the motive or purpose of Congress in enacting a specific statute to control and define conduct as long as Congress acts within the powers granted it by the Constitution. As has been pointed out, Congress, in passing the Emergency Price Control Act, has attempted to clothe its delegate—an Administrator—with the same unchallengable legislative power which it possesses. In this respect the delegation is no different from that involved in the National Industrial Recovery Act which was held invalid in *A. L. A. Schechter Poultry Corp.* v. *United States*, *supra*.

We are told that "Congress has specified the basic conclusions of fact upon the ascertainment of which by the Administrator its statutory command is to become effective." This means, I take it, that the Administrator need find no facts, in the accepted sense of the expression. He need only form an opinion,—for every opinion is a conclusion of fact. And "basic" means, evidently, that his opinion is that one of the "purposes of the Act" requires the

making of a law applicable to a given situation. It is not of material aid that he discloses the reasons for his action. Such a test of constitutionality was unanimously rejected in the *Schechter* case.

The statute there in question declared the policy of Congress to be "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Under that Act the President was required to find that the promulgation by him of a code of fair competition in any industry would "tend to effectuate the policy" of Congress as above declared. He did so find in promulgating the code there under attack.

I have already quoted what this court said with respect to the so-called standards established by the statute. That case and this fall into exactly the same category. There it was held that the President's basic conclusions of fact amounted to an exercise of his judgment as to whether a law should come into being or not. Here it is said that the Administrator's basic conclusions of fact are but the enforcement of an enactment by Congress. Whether explicitly avowed or not, the present decision overrules that in the *Schechter* case.

The judgment of the Administrator is, by this Act, substituted for the judgment of Congress. It is sought to make that judgment unquestionable just as the judgment of Congress would be unquestionable once exercised and embodied in a definite statutory proscription. But Congress, under our form of Government, may not surrender its judgment as to whether there shall be a law, or what that law shall be, to any other person or body.

The Emergency Price Control Act might have been drawn so as to lay down standards for action by the Administrator which would be reasonably definite; it might have authorized inquiries and hearings by him to ascertain facts which affect specific cases within the provisions of the statute. That would have been a constitutional and practicable measure. It has done no such thing.

But it is said the Administrator's powers are not absolute, for the statute provides judicial review of his action. While the Act purports to give relief from rulings of the Administrator by appeal to the Emergency Court of Appeals and to this court, the grant of judicial review is illusory. How can any court say that the Administrator has erred in the exercise of his judgment in determining what are defense activities? How can any court pronounce that the Administrator's judgment is erroneous in defining a "defense-rental area"? What are the materials on which to review the judgment of the Administrator that one or another period in the last three years reflects, in a given area, no abnormal, speculative, or unwarranted increase in rent in particular defense housing accommodations in a chosen defense-rental area? It is manifest that it is beyond the competence of any court to convict the Administrator of error when the supposed materials for judgment are so vague and so numerous as those permitted by the statute.

One only need read the decisions of the Emergency Court of Appeals to learn how futile it is for the citizen to attempt to convict the Administrator of an abuse of judgment in framing his orders, how illusory the purported judicial review is in fact. I have spoken more at length on this subject in my opinion in *Yakus* v. *United States*, No. 374.

I think the judgment of the District Court was right and should be affirmed.